

**STETSON UNIVERSITY COLLEGE OF LAW
Gulfport, Florida**

GENERAL INSTRUCTIONS

I DIRECT THE ATTENTION OF ALL STUDENTS TO THE FOLLOWING:

1. The answers and the pledge are to be identified by examination number only.
2. During the course of the examination, the examination and answers may not be removed from the rooms prescribed for taking the examination.
3. This examination ends at the expiration of the time allotted, or when the examination is turned in, whichever comes first.
4. The instructor will be permitted to grade only answers that have been submitted during the examination, in the manner indicated by the instructor.
5. From the conclusion of the time prescribed for the examination, students are forbidden from communicating with the instructor with reference to this examination until grades have been turned into the Registrar's Office except that students may communicate with the instructor at any time concerning matters related to the Code of Student Professional Responsibility.

TIME FOR EXAMINATION: THREE AND ONE-HALF HOURS

SPECIAL INSTRUCTIONS

1. This is a LIMITED OPEN BOOK examination. You may use the textbook for the course, your notes, any handouts distributed in class, and outline(s) you prepared either alone or in conjunction with others. You may also use a calculator in connection with this exam. You may not bring any of my past exams or answers.
2. This examination consists of ten (10) pages. You should check now that you have all pages.
3. The examination consists of a single fact pattern in connection with which you will need to answer three questions. Please make sure you answer all three questions. Question #1 is worth fifty (50) points and I suggest you allot one hour and forty-five minutes to answer it. Question #2 is worth twenty-five (25) points and I suggest you allot fifty minutes to answer it. Question #3 is worth twenty-five (25) points and I suggest you

allot fifty minutes to answer it.

4. If you believe that you require any additional facts or need to make any assumptions, make sure that you identify such matters in your answer. When you are able to come to a specific dollar figure, you should do so. In those situations in which you cannot do so, you should explain the way in which you would reach such a figure after a trial.
5. Any statutes that you may need to consult in connection with this exam are included as Exhibit A to this document. Unless you conclude one of those statutes apply, you should assume that the issue will be governed by common law principles. To the extent you believe there are competing common law principles, you may wish to address all of them when rendering your advice.
6. When answering the questions, you should disregard whether (1) interest would or should be awarded on any monetary recovery, (2) any monetary recovery would or should be reduced to present value, and (3) costs, including attorneys' fees, would or should be awarded in conjunction with any other remedy.

END OF INSTRUCTIONS – GOOD LUCK!!

PLEASE TURN THE PAGE AND BEGIN THE EXAM WHEN YOU ARE READY

The Story

You are a lawyer in the State of Stetson, one of the United States. Stetson is a common law jurisdiction. Any Stetson statutes relevant to the matters discussed in this exam are contained as part of Exhibit A hereto. You should assume that Stetson has not enacted any version of the Uniform Commercial Code. Thus, there is no possibility that the UCC could apply to any part of the events about which you are about to learn. Of course, Stetson law does not prohibit using the UCC and principles related thereto as persuasive authority if that is appropriate.

Sandra Day, owner of Sandra's Gem Stones, has an appointment to see you. Here is her story: Sandra is a specialist in gem stones. She does not work with these stones to create jewelry. Rather, her focus is finding ways to use gem stones as part of commercial manufacturing operations. Sandra had two current projects of particular importance for her visit.

The first project concerned what she calls the "diamond device." The diamond device uses a diamond as the means to make incredibly detailed designs in precious metals such as silver and gold. The design is then able to be reproduced by more traditional means. This process is possible due to unique properties in the diamond used to make the design in the first instance. Sandra had only one prototype of the diamond device, which remained in the experimental phase. But all Sandra's testing suggested that the diamond device could revolutionize the precious metal etching business.

The second project of note was beyond the prototype phase. The second device used rubies and emeralds to refract light in certain ways. Through a special process Sandra developed, this "ruby/emerald device" was able to create incredible light displays that could be used in theatrical productions and at sporting events, among other things.

Sandra asked to meet with you to discuss issues that have arisen with both the diamond device and the ruby/emerald device. She also has a separate issue with another business near her workshop. She laid out her tale of woes concerning these three matters separately as follows:

The Diamond Device

Near the end of November 2004, Sandra decided that the diamond device was ready to be shown to the world. Her plan was to rent the device to a manufacturing business for a period of time during which she would evaluate its use and, she hoped, drum up demand for the product. Eventually, she hoped to sell the devices to many businesses. She decided to invite various players in the precious metal etching business to her workshop to examine the device. One of these manufacturers was David, the owner of David's Metal Works.

David was really an artist at heart. He loved the process of creating etchings on metals such as silver and gold. When he saw the diamond device he was absolutely amazed. It could

perform etching functions far beyond anything on the market. David really wanted to have it. But there was a problem. Sandra told the assembled group that she was going to select one etching business to rent and use the prototype device for a one year period. Many of the other manufacturers present began to shout out bids for the right to use the prototype. The rental bids for this one year period ranged from \$100,000 to \$5,000,000. The one thing David knew what that he did not have the financial ability to compete with these bids even at the low end given his current cash flow situation. Sandra told the assembled gathering that she would consider how she wanted to proceed and would let everyone know when to submit actual bids to use the prototype diamond device.

David decided that he had to do something. As he was leaving Sandra's workshop, he asked to see the diamond device one more time. While Sandra was not looking, David picked the device up and put it in his pocket. He then left the workshop and went immediately to his business to start experimenting with the device. David had only a one location out of which he did all his work. He had no employees, running his business by himself. He did not pay himself a salary. He simply took as profits everything leftover after paying expenses.

Sandra did not notice that the device was gone. As you will learn when she tells you about the problems with the ruby/emerald device, she got distracted on other business at the time.

David worked throughout December with the diamond device to create an etching design for a silver bracelet. He was able to create an intricate design that he then etched onto the silver using more traditional methods of production. Thus, David used the diamond device to create the design. He then used machines at his shop to etch the design onto the silver bracelets. He then packaged the bracelets and sold them to dealers. He normally used newspapers and the like to advertise his products. He decided to try an experiment and use only the Internet to advertise the silver bracelets. He did not advertise any other product on the Internet. As described more fully below, this line of bracelets was an amazingly successful seller.

David began selling the silver bracelets with the diamond-produced etching in January 2005. He continued to sell the bracelets until June 30, 2005 when Sandra found out about the theft. At that point he stopped sales figuring that he should lie low. Between January 2005 and June 30, 2005, the silver bracelet line was the best seller of the 3 product lines he had. In addition to the silver bracelets, the other two product lines were gold necklaces and aluminum rings. David's business during the period was restricted to these 3 product lines. Here is the gross revenue information for sales of the various product lines from January 2005 through and including June 2005 (these figures do not reflect the deduction of any expenses):

PRODUCT LINE	GROSS REVENUE	UNITS SOLD
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silver bracelets (i.e., diamond-made design)	\$1,500,000	250,000
gold necklaces	\$2,000,000	100,000
aluminum rings	\$200,000	50,000

Of course, not all of the revenues were profit; David had expenses in running his business. You should assume his expenses during the period from January 2005 through and including June 2005 were as follows:

EXPENSE TYPE	EXPENSE AMOUNT
cost of materials – gold	\$1,000,000
cost of materials – silver	\$750,000
cost of materials – aluminum	\$50,000
advertising expenses – Internet	\$25,000
advertising expenses – non-Internet	\$100,000
electricity	\$200,000
rent	\$250,000

Sandra also told you that she had consulted a number of experts in the field concerning two issues. First, she asked about the value of David’s artistic efforts in creating the designs used on all three of the product lines. There was general agreement that if David had paid to have the designs done at similar quality, he would have paid \$150,000. Of course, he did not actually make these payments because he did the designs himself and did not pay himself a salary.

The second issue in which Sandra was interested was what value her diamond device added to the silver bracelet David created and sold. On this issue she got wildly varying estimates from the five experts with whom she consulted. The experts’ estimates of the percentage of contribution the diamond device’s design contributed to the final bracelet were as follows: 80%, 30%, 25%, 20% and 5%.

QUESTION #1

(50 Points / Suggested Time: One Hour and Forty-Five Minutes)

Sandra has asked you to explain the various remedial options she has concerning David. You should assume in responding that Sandra will be able to hold David

liable under the relevant substantive law. You should be as complete as possible in your answer. You should also identify weaknesses in any remedial approaches

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The Ruby/Emerald Device

Sandra continued her tale by telling you about her problem concerning the ruby/emerald device. During the fall of 2004, Sandra was busy negotiating to have the National Basketball Association (“NBA”) buy fifty (50) ruby/emerald devices for use at various arenas around the country. Sandra and the NBA were eventually able to reach an agreement in which Sandra agreed to deliver the 50 ruby/emerald devices to the NBA no later February 15, 2005. If the devices were not delivered by that date, the NBA retained the right to cancel the contract. Sandra was to receive \$500,000 from the NBA in connection with the transaction.

Sandra was very excited about the NBA deal and she immediately turned her attention to finding a manufacturer for the ruby/emerald devices. She eventually settled on Thomas Manufacturing Inc. (“Thomas”) as the manufacturer. After explaining to Thomas the details of the NBA agreement, Sandra and Thomas entered into a contract, the relevant portions of which are set forth below:

Manufacturing Agreement

This Agreement is made as of the 6th day of December 2004 between Sandra Gem Stones (“Sandra”) and Thomas Manufacturing, Inc. (“Thomas”). The parties agree as follows:

1. Sandra agrees to provide the specifications for the ruby/emerald device to Thomas upon execution of this Agreement.
2. Thomas agrees to manufacture and deliver to Sandra 50 ruby/emerald devices by February 1, 2005.
3. Sandra agrees to pay Thomas \$200,000 for manufacturing the 50 ruby/emerald devices. The payment is due upon delivery.
4. The parties agree that a reasonable estimation of damages for any breach of this Agreement is \$400,000. Under no circumstances shall either party be liable for consequential damages that may be caused by a breach of this agreement.
5. The parties acknowledge that they have been represented by counsel in connection with the negotiation, drafting and execution of this Agreement.

[End of Contract Provisions]

The problem is that February 1st came and went without delivery. Sandra immediately

called Thomas to find out what was wrong. Thomas explained that due to labor problems at his factory he was unable to produce the devices. Sandra immediately contacted a number of potential manufacturers. Sandra elected to go with Ruth Mfg. (“Ruth”) to produce the devices. Ruth agreed to do so at a cost of \$350,000. Other manufacturers were willing to produce the devices for less than \$350,000, but none of them could begin in time to meet the NBA deadline. Ruth worked around the clock, but she was not able to deliver the devices until February 16th. Unfortunately, the NBA had cancelled its contract with Sandra the night before as was allowed under the terms of the Sandra/NBA contract.

Sandra took delivery of the devices from Ruth and paid her the \$350,000. Sandra still has all 50 devices, which work perfectly. She hopes to sell them in the future.

QUESTION #2
(25 Points / Suggested Time: Fifty Minutes)

Sandra plans to sue Thomas for breach of contract. She has asked you for advice concerning her likely recovery in such a suit. Assuming Sandra is successful as to liability, please explain her likely recovery. You should discuss various possibilities as well as the likelihood of success.

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The Problems with the Nearby Business

Finally, Sandra told you about some problems she has been having with a nearby business. William’s Relaxation Spa (“William”). William’s spa is located about a half mile down the road from Sandra’s workshop. William had been at this location for 4 years. He entered the Spa business at this time. Sandra moved to her workshop 3 years ago. Things had gone so well for Sandra over the past few years that she recently entered into a long term (10 year) lease on the property expanded her workshop.

William and Sandra had never really gotten along, but things had really been bad lately. In fact, William had filed a lawsuit against Sandra. William claimed that Sandra’s business was a nuisance had caused him harm. As William alleged, he ran a spa focused on getting people in high stress jobs to come to his location for massages, yoga and other relaxation-focused activities. According to William, the machines Sandra used as part of her business emitted an ultra high frequency sound that about 15%-20% of humans could hear. He further claims that this sound caused him to lose business and thus lose profits because some high stress people he could otherwise have served decided to stay away because of the sound issue. William claims he noticed the problem as soon as Sandra moved into the area 3 years ago. According to his calculations, his profits over the three years had been reduced by about \$100,000 based on a comparison to the one year period before Sandra moved into the neighborhood.

William seeks two things in his lawsuit. First, William seeks compensatory damages in

the amount of \$100,000 for lost profits caused by Sandra's commission of a tort in negligently and intentionally causing the high frequency sound waves to disrupt his business. Second, William seeks a permanent injunction barring Sandra from conducting her work at the workshop location, at least in the manner she currently uses. You may wish to know that the statute of limitations on the nuisance claim is six years from the date of the injury.

QUESTION #3

(25 Points / Suggested Time: Fifty Minutes)

Assuming that William would be able to prevail as a matter of substantive law, Sandra wants your advice about the likelihood that he will be successful in obtaining the two remedies he seeks. Accordingly, please advise Sandra concerning William's claim for damages and his request for an injunction.

**ON MY HONOR, I HAVE
NEITHER GIVEN NOR
RECEIVED AID ON THIS
EXAMINATION.**

EXAM NO. _____

END OF EXAMINATION

ENJOY YOUR BREAK

EXHIBIT A BEGINS ON THE FOLLOWING PAGE

Exhibit A

Relevant Statutes

Stetson Statute #1

Right of Replevin: Any person whose personal property is wrongfully detained by any other person may have a writ of replevin to recover said personal property. The writ of replevin shall be in addition to any monetary recovery to which the person is entitled by way of damages or otherwise.

Stetson Statute #2

Punitive Damages

(1) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:

(a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

(b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

(2)(a) Except as provided in paragraphs (b) and (c), an award of punitive damages may not exceed the greater of:

1. Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or

2. The sum of \$ 500,000.

(b) Where the fact finder determines that the wrongful conduct proven under this section was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of:

1. Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or

2. The sum of \$ 2 million.

(c) Where the fact finder determines that at the time of injury the defendant had a specific

intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages.